IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

No. 334

JOHN HOWARD LAWSON, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

AMICUS CURIAE BRIEF OF THE NATIONAL LAWYERS GUILD ON PETITION FOR WRIT OF CERTIORARI.

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STATEMENT.

The National Lawyers Guild is a national association of members of the bar having chapters throughout the United States. Important among its objectives is protecting and fostering the civil rights and liberties of the people and to that end the Guild has participated frequently in proceedings involving basic human rights. Its goal has consistently been to support a resolution of conflicts in the field of civil rights and liberties in the spirit and within the meaning and intent of the Bill of Rights as applied to concrete problems of our times.

The issues in this proceeding, the Guild is convinced, typify and embody the essential characteristics of a rapidly growing technique of repression gravely threatening free-

dom of speech in the field of political philosophy. This Court will take judicial notice of the controversy involving political ideologies now raging not only in our own country but throughout the world. This conflict is not dissimilar to that which rocked the civilized world at the time of the formation of our own Republic. While it is clearly not the function of this Court to sit in judgment on political issues, under our Constitution, it is charged with the responsibility of preserving the constitutional climate in which the people themselves may be free to decide such issues. It has been repeatedly pointed out by this Court that any attempt by government or its agencies to stifle free and open discussion or free communication of the tenets of these conflicting political philosophies is a forbidden invasion of the peoples' right to hear as well as an abridgment of the personal liberty of the proponents. *DeJonge* v. *Oregon*, 299 U. S. 353; *Schneiderman* v. *United States*, 320 U. S. 118; *Bridges* v. *Wixon*, 326 U. S. 135.

The precise question raising the issues to be discussed herein, was whether petitioner was or ever had been a member of the Communist Party. Otherwise stated, petitioner was asked to disclose his political affiliation. For refusing to answer this question, relying upon constitutional grounds. witnesses subpoenaed to appear before Federal and State legislative committees, grand juries and other governmental bodies have been sent to jail and in some cases denied bail on the assumption that the First Amendment afforded no protection against self disclosure of one's political affiliation. A great many more of such witnesses are being threatened with prosecution.

If this assumption is in error many people have been illegally denied their constitutional rights and deprived of their liberty and it is a fair supposition that unless the error is corrected many others will be similarly dealt with. The practice of asking questions concerning political affiliation has become widespread and is being used extensively not only by the Un-American Activities Committee of the

House, but by a subcommittee of the House Committee on Education and Labor, various state legislative committees patterned on the Un-American Activities Committee of the House, and United States Attorneys in charge of federal grand jury proceedings. Recently five individuals were sentenced to jail without bail by the Denver, Colorado, U. S. District Court for failure to answer questions bearing upon their political affiliation and on October 25, 1948, ten witnesses were committed to jail by the U. S. District Court in Los Angeles, California, for refusing to answer similar questions. (The Evening Star, Washington, D. C., October 26, 1948.)

The matter is therefore one of impelling urgency calling for an immediate clarifying decision on this vital issue lest large numbers of people be deprived of their liberty through denial of their constitutional rights without effective means of speedy redress. It is earnestly submitted that this Court should exercise its power of review in this case so that people may know where they stand under the Constitution with respect to their political rights.

JURISDICTION.

This Court has jurisdiction to grant writ of certiorari herein by virtue of Title 28, United States Code, Section 1254 (1).

QUESTION PRESENTED.

It is the purpose of this brief to discuss the single question of whether petitioner was protected against answering a question as to whether he was then or ever had been a member of the Communist Party by the provisions of the First Amendment of the United States Constitution. In discussing this question, emphasis will be placed on the right to silence as a correlative of freedom of speech.

In selecting this issue for discussion there is no intent to minimize the other issues raised and discussed in petitioner's brief in support of his petition to this Court for writ of certiorari.

ARGUMENT.

Was Petitioner Protected Against Disclosure of His Political Affiliation by the First Amendment?

The precise question under consideration here does not directly involve the positive aspects of the free speech and assembly guarantees but rather the correlative right of silence upon subjects falling within the protection of the First Amendment. There is, it must be admitted little if any direct authority upon the right of silence but, as will be shown, recognition of this right has underlain many decisions of this Court involving the positive aspects of free speech and assembly. Its emergence as a logical and necessary component of the constitutional guarantees referred to has been foreshadowed in other decisions involving cognate rights.

It is clear that free speech must be related to the circumstances and conditions under which it is exercised to be understood. It obviously does not exist in vacuum. Indispensable to the enjoyment of free speech is at least one listener and this necessarily involves the association of two or more persons. Hence, it follows that freedom of association is essential to the exercise of the right of free speech. Indeed freedom of association bridges the gap between unorganized and perhaps informal discussion and the more formal and often purposeful assembly.

Freedom of association is a basic reality of our times. The constitutions of over thirty countries, including postwar France (New York Times, Oct. 1, 1946 at 16c) and postwar Japan (New York Times, March 9, 1946 at 6), express world-wide recognition of this essential freedom. In none of these countries has this right been more valued and protected *in practice* than in the United States.

While "freedom of association" is not expressly mentioned in our Constitution and it is true that this Court has not yet found occasion to assert this right *eo nomine* as the

basis for any of its decisions, it is believed that this evidences no intent to deny the existence of the right but rather a tacit acceptance of the fact that it is implicit in the very concepts of free speech and assembly. No other explanation reconciles with the common experience and practice of people living in a democracy. It is the studied conclusion of two distinguished scholars that freedom of association is deeply rooted in American Society. (James Bryce, American Commonwealth, vol. 2, p. 282, 1924; Gunnar Myrdal, An American Dilemma, vol 2, p. 952, 1944.) In *Whitney* v. *California*, 274 U. S. 357, 371, this Court seems to have recognized the right of association as cognate to those expressed in the first Amendment in the following language: "Nor is the syndicalism act as applied in this case repugnant to the due process clause as a restraint on the right of free speech, assembly and association."

To find, therefore, the right of association implicit in the First Amendment does no violence to either the language or intent of that provision but rather rounds out and completes the necessary implications of the guarantees of free speech and assembly. For the purpose of this analysis, it is believed accurate to consider the right of free speech as the right to communicate ideas to others. The right of assembly effectuates the results of such communication by relating them to groups rather than to individuals. Without the right of association and assembly, freedom of speech could result only in useless and chaotic verbalism and the desirable democratic objectives sought to be gained by freedom of speech and assembly would be lost.

The Right of Silence.

Acceptance of the foregoing conclusions leads to a consideration of the right of silence. In approaching this subject it is recognized that decision as to the existence or nonexistence of the right may turn upon the adoption of one or the other of two different views concerning the relationship between the government and the people. Accord-

ing to the first view, the government stands above and is superior to the people and the latter's rights are subordinate to and limited by the "natural" prerogatives of the former. This is the authoritarian view. The opposite attitude holds that government occupies a subordinate position as agent and servant of the people possessing only such rights as the people choose to surrender to it. The first view is exemplified by Alexander Hamilton's characterization of the people ("The people, Sir, is a beast") and the second by the words of Thomas Jefferson:

> "Men, by their constitution, are naturally divided into two parties: 1—Those who fear and distrust the people and wish to draw all power from them into the hands of the higher classes. 2—Those who identify themselves with the people, have confidence in them, cherish and consider them as the most honest and safe, although not the most wise, depository of the public interests."

Returning to consideration of the right of silence, this Court expressly recognized that the right of free speech included the corresponding right of silence in *West Virginia State Board of Education* v. *Barnette*, 319 U. S. at 645, in stating that the right of free speech

> "includes both the right to speak freely and the *right to refrain from speaking at all*, except in so far as essential operation of government may require it for the preservation of an orderly society—as in the case of compulsion to give evidence in court."

The right of silence is formulated in 11 Am. Jur. 1109, 1110, in the following language:

> "The liberty to write or speak includes the corresponding right to be silent and also the liberty to decline to write, and such rights, as well as the right to privacy, or the right to speak only when one may speak freely, are insured under this constitutional provision."

See also *Wallace* v. *Ry. Co.*, 94 Ga. 732; *St. Louis Southwestern Ry. Co.* v. *Griffin*, 106 Tex. 477; *Prudential Ins. Co.* v. *Cheek*, 259 U. S. 530 at 538, 543; *Ex parte Re Harrison*, 212 Mo. 88, 110 S. W. 709.

It cannot be denied that the right of silence has been recognized and protected on subjects closely allied to the ones under consideration. Thus it seems clear that in the United States one's religious beliefs and opinions are protected against self-disclosure. *Searcy* v. *Miller*, 57 Ia. 613, 10 N. W. 912; *Dedric* v. *Hopson*, 62 Ia. 562, 17 N. W. 772; *Com.* v. *Smith*, 2 Gray (Mass.) 516; *Com.* v. *Burke*, 16 Gray 33. Cf. *United States* v. *Ballard*, 322 U. S. 78 at page 86, in which the following language appears: "Men may believe what they cannot prove. They may not be put to proof of their religious doctrines or beliefs."

Closely analogous to the right of silence is the right of privacy or, as it has been described "the right to be left alone," which was clearly stated by Brandeis, J., in *Olmstead* v. *United States*, 277 U. S. 438, at page 478, as follows:

> "The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfaction in life are to be found in material things. They sought to protect Americans in their beliefs, their emotions and their sensations. They conferred, as against the Government, *the right to be left alone*—the most comprehensive right and the right most valued by civilized man. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, by whatever the means employed, must be deemed a violation of the Fourth Amendment."

Recognition and acceptance of the proposition that the right of free speech includes within it the corresponding right to refrain from speaking at all is a logical and natural step in the process of defining the concept of free speech

and revealing its scope and necessary implications. Analogously, freedom to contract includes the right to refrain from contracting; the right of assembly implies the opposite right to refrain from assembling; and the right to worship, by necessary implication, gives one the right not to worship. Were such not the case, freedoms would become duties instead of rights and privileges and the contemplated benefits of the constitutional guarantees would become meaningless.

An application of the right to remain silent as to ones political affiliation is to be found in our traditional secrecy of the ballot. Justice Cooley commented on this subject as follows:

> "The mode of voting in this country at all general elections is almost universally by ballot. * * * The distinguishing feature of this mode of voting is, that every voter is thus enabled to secure and preserve the most complete and inviolable secrecy in regard to the persons for whom he votes, and thus escape the influences which, under the system of oral suffrage, may be brought to bear upon him with a view to overbear and intimidate and thus prevent the real expression of public sentiment.
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> "The system of ballot-voting rests upon the idea that every elector is to be entirely at liberty to vote for whom he pleases and with what party he pleases, and that no one is to have the right or be in a position to question his independent action either then or at any subsequent time."
>
> 2 Cooley's Constitutional Limitations, 8th Ed. pp. 1373, 1376. See also *Commonwealth* v. *Gibbs*, 3 Yeats (Pa.) 429.

Were voters not protected against self-disclosure of their political affiliations, the secrecy deemed essential to the effective use of the ballot would be greatly impaired if not wholly destroyed. If it be conceded that petitioner could not be interrogated as to his party affiliation as a condition precedent to exercising his right to vote, it follows that the

committee had no greater right to inquire on the subject than would an election inspector. Any other decision on this point would open the door to the evils sought to be forestalled by our free elective system and result in the disintegration of a process considered indispensable to the maintenance of our democratic way of life. For if the question may be asked of a member of one political party, it necessarily follows that it may be asked of any member of any political party. Our law recognizes no distinction between the parties. All are equal before the law.

To hold that petitioner should have answered the committee's question as to membership in the Communist Party on the ground that it was merely a "preliminary" interrogation or a means of identification (See *Thomas* v. *Collins*, 323 U. S. 516 for a similar contention) is not only to beg the question but to lose sight of the basic issues raised by the question and the realities of the situation with which the witness was confronted.

The legal issue raised by the propounded question is whether petitioner had a constitutional right to remain silent as to his party affiliation. Conceding that certain narrow limitations may be imposed upon this right when such limitation is shown to be essential to the operation of government, *West Virginia State Board of Education* v. *Barnette*, supra, the area of limitation cannot be measured by discretion and cannot undermine the constitutional guarantee against abridgment of free speech and free assembly. It must not be forgotten that the prohibition against abridgment of these basic rights is stated in unqualified terms, *Bridges* v. *California*, 314 U. S. 252, and that these guaranteed freedoms stand in a preferred position, *Follett* v. *Town of McCormick*, 321 U. S. 573; *March* v. *Alabama*, 326 U. S. 501. See also Free Speech and its Relation to Self-Government, pp. 16-19, Alexander Meiklejohn, Harper & Bros. 1948.

With respect to the realities of the situation, the need for the protection afforded by the right of silence is empha-

sized by the well-known consequences following self-disclosure of affiliation with an unpopular group or organization. The practical consequences range all the way from bitter criticism to physical violence and even death. Common among such consequences are loss of employment, social ostracism and various forms of assault. No one will deny that in many circumstances, in addition to membership in the Communist Party, anonymity is essential both to the safety of the individual and the success of programs designed to bring about changes in our social or economic systems through permissible activities within the framework of the First Amendment. Examples of such situations are: membership in the National Association for the Advancement of Colored People in certain sections of the South; affiliation with a new political party (e.g. The Progressive Party) in regions where its announced policies or objectives are violently opposed; membership in trade unions in sections of the country where workers are largely unorganized; membership in organizations denying the theory of white supremacy in certain sections of the South. To compel individuals to disclose affiliation under such circumstances is to impose an effective restraint on the ultimate benefits intended to be realized through free trade in ideas. After forced disclosure, the right of free speech exists only as an abstraction. A witness exposed to the hazards mentioned, in obedience to the most elementary laws of nature would thenceforth be inclined to dissociate from his chosen group and hold his tongue on controversial subjects. Only the very brave or the very ignorant would be undeterred from further efforts. To make extraordinary courage a condition precedent to the exercise of basic civil rights is equivalent to withholding them from all but exceptional people. Moreover the restraining effects of forced disclosure would reach out beyond the individual to others associated with unpopular causes or groups and effectively inhibit further activities in the field of civil rights.

No more effective means can be conceived of stifling the rights of free speech, association, and assembly by minority groups than by exposing its members to the censure and even violence of a pre-conditioned public hostility. No doubt this is the precise purpose intended to be served by the inquiry made in the instant case. Indeed, there is evidence in the record to show that the purpose was to secure the discharge of petitioner from his employment.

It should be noted also that the right of silence contains none of the implications inherent in the positive aspects of free speech. The famous analogy of Justice Holmes of falsely shouting fire in a theatre has no application here. Restrictions on the right if any be permitted, must of necessity be narrowly circumscribed and limited to concrete situations in which it appears conclusively that unless a particular answer is compelled, the operation of the state's essential functions will be prevented. Any other evaluation of the right of silence would be to deny its substance, together with other basic human rights, which stand in a privileged position even as against the government. *Olmstead* v. *United States, supra.*

It is submitted, therefore, that the obverse of the coin of free speech is the right to refrain from speaking at all, a right which resides in the concept of freedom of speech as a logical and necessary component thereof. The two rights constitute a single unity and in marking out the metes and bounds of the territory in which they are free to operate, any line drawn to designate permissible limits thereof must have as its benchmark the constitutional mandate forbidding abridgment of the freedoms guaranteed by the First Amendment.

> "The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system."
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> *Stromberg* v. *California,* 283 U. S. at 369.

CONCLUSION.

The issues raised in this proceeding penetrate to the very roots of our democratic way of life and decision thereon may well mark a milestone in our constitutional history. The opportunity here presented to clarify basic rights and bring about a better and firmer relationship between our government and the people is very great. The National Lawyers Guild is proud to have the opportunity to contribute its part towards a democratic solution.

Respectfully submitted,

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